The SHOSHONE-BANNOCK TRIBES

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September 12, 2014

Mr. Mathy Stanislaus, Assistant Administrator
Office of Solid Waste and Emergency Response
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, N.W.
Mail Code 5101T
Washington, DC 20460

Re: FMC Site-Wide Grading Phase – Engineering Design Submittal and Remedial Action Work Plan, Eastern Michaud Flats Superfund Site, FMC Operable Unit, Fort Hall Indian Reservation and Power County, Idaho

Dear Mr. Stanislaus:

On behalf of the Shoshone-Bannock Tribes ("Tribes"), I am writing to request that all site-wide grading phase pre-construction and construction activities at the Eastern Michaud Flats Superfund Site – FMC Operating Unit ("FMC OU") be halted immediately. These activities were approved by EPA in violation of the 2012 Interim Record of Decision Amendment ("IRODA") and the 2013 Unilateral Administrative Order for Remedial Design and Remedial Action, EPA Docket No. CERCLA 10-2013-0116 ("UAO"), and therefore violate CERCLA. At the least, these activities should be halted to allow for a Government-to-Government consultation between EPA and the Tribes to ensure adequate protection of the health and safety of the residents of the Fort Hall Reservation.

On August 12, 2014, the Tribes wrote to Mr. Jonathan Williams, EPA Region 10 Remedial Project Manager, requesting a government-to-government consultation to discuss aspects of the FMC Corporation's Grading Phase Remedial Design Report and Remedial Action Work Plan ("Plan") that violate and are inconsistent with the IRODA and the UAO. In his September 3, 2014 response, Mr. Williams did not address the Tribes' concerns and refused to conduct a consultation with the Tribes, stating that the consultation that occurred prior to the issuance of the IRODA was sufficient. We believe the Plan violates the IRODA and the UAO and, if it is to be implemented, requires formal amendment of the IRODA, including all required public notice and comment.

Specifically, the Tribes take issue with the site-wide grading work component of the Plan, which includes the excavation, transportation, placement, and grading of slag and other fill materials throughout various portions of the site to provide the foundation for subsequent evapotranspirative and gamma caps that will be constructed in a later phase of the work. The Plan indicates that the majority of the fill will be obtained from the slag pile in Remedial Area ("RA")-F and will be used for re-grading in several other RAs. RA-F has never been fully characterized or analyzed, so there currently is no way to know the makeup of the material that would be spread around the FMC Site if the grading takes place as planned. The slag pile is not homogenous, as stated in numerous documents pertaining to the FMC OU, and the slag is known to be radioactive. Based on historical studies, such slag emits 60-65 mrem/hour gamma radiation, while background is 20 mrem/hour.

EPA is aware that the slag pile contains varying levels of antimony, arsenic, barium, beryllium, boron, cadmium, chromium, cobalt, copper, fluoride, lead, lithium, manganese, mercury, molybdenum, nickel, selenium, silver, thallium, uranium, vanadium zinc, uranium-238, radium-226, lead-210, polonium-210, and potassium-40. (*See* Supplemental Remedial Investigation Report for the FMC OU, Table 4-3, May 2009.) In fact, the requirement in the IRODA to place gamma caps over much of the site is due to the high radioactivity from slag. In addition, in previous site documents and in many meetings, FMC has stated that the slag should remain in place because there are at least 22 railcars with phosphorus waste buried underneath the slag. As FMC acknowledged, at least some of the railcars are likely to have leaked this waste, which is very hazardous when exposed to water and air, as might occur if the slag pile is disturbed.

Although site-wide grading of the FMC OU has been discussed and reviewed, the use of contaminated slag as fill or for grading in other areas of the FMC OU was never specifically considered or approved under the UAO, IRODA, or the Supplemental Feasibility Study ("SFS"). The UAO directs FMC to perform the remedial design and remedial action described in the IRODA, including placement of soil caps, and does not reference the slag. *See* UAO at 3, 12, 19. The IRODA also does not reference the use of slag to re-grade and contour the site. *See, e.g.*, IRODA § 8.3.3. Likewise, the SFS references the need to grade the site for capping, mentioning the use of on-site sources including soil and granular materials, but not including the use of radioactive slag at the site nor reviewing the health and safety aspects of using that radioactive slag as fill.[1]

[1] *See* SFS § 7.3.3.2 Use of Soil Cover (Gamma) Caps. "After grading to establish the appropriate cap slopes and stormwater drainage/collection, a gamma cap would be placed on those areas that are covered by fill materials, but do not pose a threat to groundwater;" SFS § 7.4.1.3. Soil Alternative 3. Implementability. "(1) Administrative Feasibility: Capping (containment) is the primary technology used in this remedy and it is a proven, straightforward remedy that is relatively easy to design and construct. On-site sources exist for cap construction materials (e.g., soil, granular materials). Therefore, this alternative is feasible and relatively easy

The use of slag in re-grading of the site was not considered in the risk assessments completed for the site. Approving this use of slag after the risk documents were developed and approved represents a significant deviation in the selected remedy and in the CERCLA process. The UAO and the IRODA are intended to protect the public health, welfare, and the environment from actual or threatened releases of hazardous substances, pollutants, and/or contaminants from the FMC OU. The IRODA states that the elemental phosphorus slag at the FMC OU must be managed in place under a soil cap designed to prevent gamma radiation exposure. Despite the IRODA's selected remedy, and in the absence of consideration of health and safety effects, EPA is approving FMC to dig into the radioactive slag pile (which FMC itself has stated should remain in place) and move more than 4,000,000 cubic yards of this material around the site, further contaminating the area.[2]

For the reasons discussed above, EPA's approval of FMC's proposal for the use of the slag in the Plan represents a significant change to the IRODA's selected remedy. Accordingly, it is necessary for EPA to go through a proposal and public comment process to amend the IRODA, *see* 40 C.F.R. § 300.435(c)(2). Failure to do so is grounds for a citizen suit against EPA for failure to perform a nondiscretionary duty under CERCLA. 42 U.S.C. § 9659(a)(2).

Moreover, EPA states in its Indian Policy that it will "give special consideration to Tribal interests in making Agency policy, and to insure the close involvement of Tribal Governments in making decisions and managing environmental programs affecting reservation lands," 1984 Indian Policy at 1; will view tribes "as the primary parties for setting standards" for their reservations, id. at 2; and "will assure that tribal concerns and interests are considered whenever EPA's actions and/or decisions may affect reservation environments," id. at 3, all of which argue in favor of recognizing the Tribes' concerns regarding the use of slag without appropriate consultation and review.

We respectfully seek intervention from Headquarters to require FMC to cease all pre-construction and construction activities at the FMC OU, to engage in Government-to-Government consultation on the proper method for implementation of the interim capping

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to implement administratively." Nowhere is it specified that "soil" and "granular materials" includes radioactive slag.

[2] EPA Guidance for soil contamination clearly states:

> If sufficient quantities of soil cover materials with appropriate engineering properties are not available within an economically practicable distance from the project site, geosynthetics or processed natural materials should be considered. Geosynthetic clay liners are generally manufactured by either sandwiching bentonitic clays between geotextiles or affixing the bentonitic clay to the bottom surface of a membrane. Thus, if clay is not readily available, low-permeability layers of the cap may be comprised of either available soil that is processed by adding bentonite to reduce the permeability or geosynthetic clay liners. For cap drainage layers, geosynthetic drainage nets may also be used, in lieu of coarse sand and gravel, to meet performance requirements. Information on geosynthetic clay liners and drainage nets can be obtained from manufacturer catalogues.

remedy, and to allow for appropriate characterization of the slag at the site. This issue is of critical importance to the Shoshone-Bannock Tribes as this site is entirely within the exterior boundaries of the Fort Hall Reservation, and the remedy will have a direct impact on the current and future health and safety of the Tribes' members and environment.

Sincerely,

Nathan Small, Chairman
Fort Hall Business Council

Cc: Barry Breen, Principal Deputy Assistant Administrator, OSWER
Jane Nishida, Principal Deputy Assistant Administrator, OITA
JoAnn Chase, Director, AIEO
Avi Garbow, General Counsel
Gina McCarthy, EPA Adminstrator
Dennis McLerran, Administrator, Region 10
Jonathan Williams, Remedial Project Manager, Region 10
FHBC (7)
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